Mr. MacMahon: Same objection.

The Court: Sustained. That is the second time you have gone into that, and it may be the third. I think maybe you asked him about that this morning. But at least it is the second time this afternoon. And I suggest that you now have your record made with respect to it and we will not go into it again.

Mr. Fennelly: The reason I did it was I thought your Honor's sustaining the objection was based on the form of the question and I, therefore, wanted to change it, which is the reason for my doing it.

The Court: I see. All right.

Q. In your testimony before the grand jury did you base it on any of the exhibits or testimony that is now in evidence in this case?

Mr. Fennelly: Your Honor, same objection.

The Court: Sustained.

Mr. Fennelly: That is all, then, your Honor.

(1984) *Redirect Examination by Mr. MacMahon:*

Q. Now, Mr. Leath, I believe Mr. Fennelly asked you some questions about some supposed bank account in the 86th Street branch of the Corn Exchange Bank in the name of Loretta B. Costello some time prior to September 1937. Have you attempted, in the course of this investigation, to locate the records of that bank account? A. Yes, sir.

Q. Were you able to find them? A. No, sir.

Q. Where is the 86th Street branch of the Corn Exchange Bank? A. It is on 86th Street near Central Park West.

Q. And where is 241 Central Park West, Mr. Leath? A. My best recollection would be it would be around 83rd or 84th Street.

Wilfred T. Leath—for Government—Redirect

Q. Where is the Hudson River branch of the Corn Exchange Bank? A. That is at 72nd Street and Columbus Avenue.

Q. Where is 115 Central Park West? A. 72nd Street.

Q. Mr. Leath, I refer you to Government's Exhibit 23 in evidence and would you read the questions which I have indicated there, the questions and the answers? A. Q. repeat your name and address? A. Frank Costello, 115 Central Park West.

(1985) "Q. How long at this address? A. Since September 1.

"Q. Where did you live previously? A. 241 Central Park West.

"Q. How long at that address? A. About six years less a month."

Q. Mr. Leath, the Corn Exchange Bank branch at 86th Street is about three blocks, is it not, from the address at 241 Central Park West? A. Approximately three blocks.

Q. And the Hudson River branch is within a few blocks of 115 Central Park West, isn't that right? A. Yes, sir.

Q. I show you Government's Exhibit 42 for identification and ask you if you can tell me from that the day the account was opened at the Hudson River branch? A. September 7, 1937.

Q. That is one week after the Costellos moved from their old address to the new one; is that right? A. Approximately one week, yes, sir.

Q. Now, Mr. Leath, I refer you to Defendant's Exhibit GG and ask you to read that letter to the jury as to any data it has with respect to when the account was transferred from the one bank to the other—one branch to the other? A. This is a letter dated January—

(1986) Mr. Fennelly: I object to the form of the question. If there is anything that states it was

transferred, I have no objection to him reading the letter.

The Court: Go ahead.

A. (Continuing). This is a letter dated January 16, 1945, from Corn Exchange Bank Trust Company, 15 William Street to Lord & Taylor, 424 Fifth Avenue, New York:

"Gentlemen: In connection with your inquiry regarding Mrs. Loretta B. Costello, 115 Central Park West, New York City, please be advised that our Hudson River branch"—"that at our Hudson River branch we have a personal checking account in the name of Loretta B. Costello. This account opened in September 1937 and previous to that time was maintained at one of our other branches."

Q. Mr. Leath, referring to Government's Exhibit 362, yesterday, on Mr. Fennelly's preliminary cross examination, he asked you if the schedule showed any currency on hand for Mrs. Costello on October 18, 1937. I believe you said that it did not because your investigation failed to reveal any? A. Yes.

Q. Then on cross examination Mr. Fennelly asked you if you knew how much currency Mrs. Costello had on (1987) hand on that date, and you said that you didn't know. Now, in your second answer were you referring to the results of your investigation? A. No, sir, I was referring to my lack of personal knowledge of it.

Q. Where were you in 1937, Mr. Leath? A. I was in school at that time.

Mr. Fennelly: I object to it as immaterial.

The Court: You weren't working on this case?

The Witness: No, sir.

Q. You said before that your investigation failed to

reveal Mrs. Costello had any cash on hand on October 18, 1937. What was the basis for that answer?

Mr. Fennelly: I object to that.

The Court: I will allow it.

A. The basis for my answer was that our investigation showed that on October 18, 1937 Mrs. Costello had a bank account at Corn Exchange Bank having a balance of approximately $1,100; that in his statement of 1937, Mr. Costello said that his wife had no income for that year; Mrs. Costello had not filed any tax returns previous—individual tax returns previous to 1937; I believe in the '37 statement Mr. Costello said that Mrs. Costello was his dependent; and in his '39 statement, he said that he gave Mrs. Costello money to put in (1988) her bank account; in 1941 Mrs. Costello purchased a Cadillac car on the installment plan; the tax returns filed for the years—tax liability for the tax returns filed for the years 1936 and '37 was paid off in small monthly installments; and tax liabilities for subsequent—

Mr. Fennelly: I object to all this as to allow a summation of the case that counsel would have in answer to a question as to whether or not he found something.

The Court: You asked this witness whether he found certain things.

Mr. Fennelly: That is right.

The Court: And whether he took account of them, and did he know this and did he know that. I am going to allow him—and I held him, at your request, to answering yes or no to many of those questions. I think it is perfectly proper for Mr. MacMahon to let him tell us the basis on which the answers which you insisted on were made.

Wilfred T. Leath—for Government—Redirect

You may go ahead.

The Witness: May I have the last answer or part?

(Record read.)

The Court: Is the sum of your answer then, (1989) that on the basis of all the evidence that has been put into this case you concluded that there was no other cash except that?

The Witness: Yes, sir.

Q. Mr. Leath, assume that, contrary to your conclusion here, that Mrs. Costello did have some cash on hand on October 18, 1937: Are you able to compute how much she would have been required to have in order to make one dollar's difference in the net worth on December 31, 1945?

The Court: Just a minute now. Let me hear that question.

(Question read.)

If I can have schedule 36—

The Court: The first question is—

Q. Are you able to make— A. Yes.

The Court: —are you able to make a computation?

The Witness: Yes, sir.

The Court: Very well.

Q. Could you state how much, Mr. Leath? A. It would

Mr. Fennelly: Excuse me, your Honor. I will object to it because I think it has become obvious

that there are matters included, and I am now—his statement is based on the assumption, I take it, of only (1990) the figures that he has included in his net worth statement in his schedule.

The Court: I am not quite sure I understand the objection.

Mr. Fennelly: I think it has been developed this morning that there are other matters that alter the net worth statement as submitted.

The Court: Oh, I see what you mean.

Mr. Fennelly: And I take it that his answer is predicated solely on his basis of net worth.

The Court: I overrule your objection, but I think, Mr. MacMahon, that before the witness gives the computation he ought to tell us what the basis of the computation is.

By Mr. MacMahon:

Q. Now, what is the basis of your computation, Mr. Leath? A. The basis of the computation is the fact that our schedule shows that the investments and expenditures—

The Court: No. Just a minute.

Q. No. Just the basis, how did you arrive at it?

The Court: You see, you were asked the question were you able to make a computation and you said you were. Now, I say to you, when making the computation which you (1991) say you are able to make what factors would you take into consideration and what sources would you use for the information?

The Witness: Yes, sir. The factors to be taken into consideration would be the net worth as of 10 18 37, the net worth as of 12 31 45, the increase

in net worth over that period; the yearly expenditures for that period; the non-taxable receipts in that period, and the gross income reported in that period.

The Court: Those matters are all shown on the exhibits now in evidence? 362?

The Witness: This schedule. Yes, sir. The amount would be more than $200,000.

Mr. MacMahon: That is all.

Recross Examination by Mr. Fennelly:

Q. And, Mr. Leath, this calculation of yours of 200,000, that would include this loss of some 36,000 that you wrote back and added, after she lost, that you added on to her income, added on to net worth? A. That is in 1948. We are talking only of '45.

Q. Did you make any adjustment in the earlier period? A. None were necessary.

Q. You didn't make any? A. None were necessary.

The Court: Did you make any 362?

The Witness: This schedule? No, sir.

(1992) The Court: 362, as it is in evidence, no adjustment shown on there?

The Witness: No, sir.

The Court: Consequently you say you made no adjustments in this computation of what Mrs. Costello's holdings would have to be to effect that.

The Witness: Yes, sir.

Q. And if you are in error as to when the 66,000 was received from Louisiana Mint Company, your computation would be out by that much, wouldn't it? A. The computation would be out by whatever amount that would be in error.

Q. That is right. And if you were in error by 60,000 your present computation of 200,000 would be out by that much; and on your $9,500 value of the Kastel partnership when in the 1939 grand jury minutes Mr. Costello testified 15,000, the difference between nine thousand five and 15,000, six and a half, thousand dollars, you would be out by that in addition, wouldn't you? A. If my computation was wrong to that extent I would be out, yes.

Q. And you would be out by every error in your defining net worth; right? A. Yes, sir.

Mr. MacMahon: That is all.

Mr. Pierpoint: The Government calls Albert Sohn.

(1993) The Court: Now, we are going to adjourn at 4 o'clock. Maybe it might be wise to take a little recess here.

Mr. Pierpoint: Thank you.

(Short recess.)

Mr. Pierpoint: Mr. Sohn, will you take the stand, please.

ALBERT SOHN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Pierpoint:

Q. Mr. Sohn, where do you live? A. 3155 Grand Concourse, Bronx, New York.

Q. Where do you work? A. I work at the office of the District Director of Internal Revenue, Upper Manhattan.

Q. You are a revenue agent, is that correct? A. I am, sir.

Q. How long have you been a revenue agent, sir? A. Approximately eight years.

Q. Where did you go to college, Mr. Sohn? A. I went to the City College of the City of New York.

Q. What degree did you take? A. I got the (1994) degree of Bachelor of Business Administration.

Q. What was your major? A. I majored in the field of accountancy.

Q. Since you had been an Internal Revenue Agent, what have your duties consisted of? A. My duties have been to examine individual, fiduciary, partnership and corporation tax returns.

Q. Now, Mr. Sohn, are you familiar with the laws and regulations concerning the calculation of income taxes for the years 1946, 1947, 1948 and 1949? A. I am.

Q. Now, Mr. Sohn, assuming that the defendants—that the defendant Costello for the year 1946 had gross income of $53,149.44, as shown on Government's Exhibit 363, and that his allowable deductions in that year were $27,934.47, as shown on Government's Exhibit 364, are you able to calculate the true tax liability of the defendant Costello for the year 1946? A. I am.

Q. And have you prepared a 1946 tax return showing that tax liability? A. I have.

(Marked Government's Exhibit 365 for identification.)

Q. Mr. Sohn, assuming that the defendant Costello for the year 1947 had gross income of $102,471.40, as shown on Government's Exhibit 363, and that for the (1995) same year his allowable deductions were $54,045.76, as shown on Government's Exhibit 364, are you able to calculate his true tax liability for the year 1947? A. I am.

Q. And have you prepared a tax return, 1947 tax return showing that liability? A. I have.

Q. And assuming that the defendant Costello for the year 1948 had gross income of $70,735.49, as shown on Government's Exhibit 363, that in the same year his allowable deductions totaled $47,570.37, as shown on Government's Exhibit 364, are you able to calculate the defendant's true tax liability for the year 1948? A. I am.

Q. And have you prepared a tax return, 1948 tax return showing that liability? A. I have.

The Court: Pardon me just a minute.

You gave a figure of allowable deductions there of $47,570.37.

Mr. Pierpoint: I beg your pardon, your Honor. The figure should be—

The Court: The allowable deductions, according to 364, is a different figure.

Mr. Pierpoint: The figure should be $23,165.12.

The Court: Suppose you reframe your hypothetical (1996) question so that it will be accurate.

Mr. Pierpoint: I will reframe the question.

Q. Now, assuming, Mr. Sohn, that the defendant Costello—

The Court: Pardon me just a minute. Did you wish to say something, Mr. Fennelly?

Mr. Fennelly: That is all right.

Q. Assuming that the defendant Costello for the year 1948 had true gross income of $70,735.49, as shown on Government's Exhibit 363, and that he had allowable deductions for that year of $23,165.12, as shown on Government's Exhibit 364, are you able to calculate the true tax liability of the defendant for the year 1948? A. I am.

Q. And have you prepared a tax return, 1948 tax return showing that tax liability? A. I have.

Q. Now, Mr. Sohn, assuming that the defendant Costello for the year 1949 had true gross income of $91,991.94, as shown on Government's Exhibit 363, and that his allowable deductions in that year were $36,434.88, as shown on Government's Exhibit 364, are you able to calculate his true tax liability for the year 1949? A. I am.

Q. And have you prepared a 1949 tax return showing that true tax liability? A. I have.

(1997) The Court: The return for 1946 has been marked 365.

The Clerk: That is right. And the return for 1947 will be marked 366 for identification.

The Court: Very well.

(Marked Government's Exhibit 366 for identification.)

The Clerk: 367, tax return 1948.

The Court: Well, it is a recomputed tax return for 1948.

(Marked Government's Exhibits 367 and 368 for identification.)

Q. Mr. Sohn, I show you Government's Exhibits 365, 366, 367 and 368 for identification and ask you if these are the tax returns you prepared? A. They are, sir.

Mr. Pierpoint: I offer them in evidence.

(A pause.)

Mr. Fennelly: I object to them as incompetent,

Colloquy

and there are some specific items I would like to point out to your Honor. Perhaps I had better do it at the bench.

The Court: Yes, you may.

(Side bar discussion out of hearing of the jury as follows:)

Mr. Fennelly: The witness, I would think, (1998) could testify about these items without having before him these prepared schedules which I think are prejudicial to the defendant, should your Honor allow them in, and I would think it should appear on them that they are schedules predicated on the assumption of the Government's claim.

Mr. Pierpoint: We didn't intend to hand these to the jury, your Honor.

The Court: It seems to me that is pretty clear already in the record.

Mr. Fennelly: I mean, the jury has some, has the other schedules that your Honor indicated you thought the Government should do that.

The Court: You mean these should be marked—all I am trying to do now is work out a formula. Will it satisfy you if these are marked, "Computations of tax as claimed by the Government"?

Mr. Fennelly: I think that would be an improvement. I don't think they ought to go in at all.

The Court: What is the reason for them not going in? Where does the prejudice come in?

Mr. Fennelly: Because I think the witness can testify to the facts. I don't think the schedules are necessary. If they do go in, they certainly ought to be clearly marked they are returns as per the Government's (1999) claim.

The Court: Yes, I think that is adequate.

Mr. Fennelly: And, for instance, where you, not only on the front, but where you have unreported gross income, I think there they certainly should be "As claimed by the Government."

The Court: I think if it is made clear to the jury that all these items are figures which the Government claims are accurate, but which it is for the jury to determine whether they are or are not accurate, and that this is only the Government's claim as to how the tax return should have been made out or tax should have been paid, that will be sufficient.

I think we are entitled to assume the jury is going to be intelligent and obedient and, if the case goes to them and there were a charge along that line, they will obey that. I will not require a further amendment all the way through.

You can indicate across here that these are—

Mr. MacMahon: How about up in the corner?

The Court: Yes. That this is merely a computation as claimed by the Government.

Mr. Fennelly: There is a similar problem I found on one of those lines, if I could look at that.

The Court: Which exhibit?

(2000) Mr. Fennelly: Those earlier schedules, and I didn't pick it up until—I am not sure whether it is 362 or 363. If I could look at them, I could find it.

The Court: Yes, here (handing exhibits to Mr. Fennelly).

Mr. Fennelly: For instance, this line on Exhibit 362, on the first page, "Expenditure of Frank Costello in excess of his reported gross, $202,000,"—Well, I think all those things ought to have "As claimed by the Government," because, I think, if the jury picks them up in the jury room and looks at

them, they may take that as the truth, and that is the very issue they are going to determine.

Mr. MacMahon: I don't mean to interrupt, but that label, "Computation as claimed by the Government," may we suggest, "Tax as claimed by the Government"?

The Court: The point is, on this one, 362, investments and so on, "As claimed by the Government" added on there, I don't see any difficulty.

Mr. Fennelly: I had missed that going through them the other day.

Mr. MacMahon: But that is the one I suggested this morning that ought to be "Unreported income as claimed by Government."

(2001) The Court: No, I will not permit that change, but you can put it there, on there, and you can put the legend on these exhibits.

Mr. Pierpoint: Yes, your Honor.

Mr. MacMahon: Up in the lefthand corner.

The Court: You have it, I take it, "Computation as claimed by the Government." I think that is adequate. Very well.

Mr. Pierpoint: We will put that on the original.

(End of side bar discussion.)

(The following proceedings held in open court.)

The Court: Exhibits 365, 366, 367 and 368 as corrected, or as modified after the conference at the bench are received in evidence, and the objections are overruled.

(Government's Exhibits 365, 366, 367 and 368 for identification received in evidence.)

The Court: So that there won't be any mystery about it, these modifications do not refer to figures but merely to indicate that these are the papers which reflect what the Government claims should be the income or is the income that the defendant should have reported and the tax that he should have paid. In other words, if the case gets to the point where you have to consider these to arrive at a verdict, you will understand that (2002) these are computations based on the prior exhibits in evidence to support the Government's contention here, but the figures on which they are based are figures the accuracy of which it will be your duty to determine.

By Mr. Pierpoint:

Q. Mr. Sohn, I show you Government's Exhibit 365 in evidence, which is the 1946 return as claimed by the Government. Will you read line 7, the tax? A. $9,482.58.

Q. I show you Government's Exhibit 4 in evidence, and will you read the—and would you subtract the figure as shown on Government's Exhibit 4 in evidence, which is the tax return of Frank Costello for the year 1946, from the figure shown on Government's Exhibit 365 in evidence? A. I have already made these computations—

Q. If you have the computations— A. To save the time.

Q. What is the figure, after you have subtracted the figure shown on Government's Exhibit 365 from the figure shown on Government's Exhibit 4? A. $1,143.86.

The Court: And that figure represents what?

Mr. Fennelly: How much is that, again?

The Witness: $1,143.86, which represents the (2003) deficiency in tax for the year 1946.

Q. I show you Government's Exhibit 366 in evidence and I ask you to read line 7, the tax as claimed by the Government? A. $27,649.07.

Q. I show you Government's Exhibit 3 in evidence, which is the Frank Costello tax return for the year 1947, and I ask you to read the figure on line 7, the tax computation? A. $5,085.94.

Q. And the difference is? A. $22,563.13.

Q. And that is the tax deficiency for the year 1947? A. That is correct.

Q. I show you Government's Exhibit 367 in evidence and I ask you to read the amount of the tax as computed by the Government? A. $15,939.50.

Q. I show you Government's Exhibit 2 in evidence and I ask you to read the amount of tax—which is Frank and Loretta B. Costello's joint tax return for the year 1948, and I ask you to read the amount of tax shown on line 7 of that return? A. $2,153.48.

Q. And the difference? A. The difference or deficiency in tax is $13,786.02.

Q. I show you Government's Exhibit 368 in evidence and I ask you to read the tax computation from line 7 as claimed by the Government? A. $19,657.38.

Q. I show you Government's Exhibit 1 in evidence, (2004) which is the joint return of Frank and Loretta Costello, and I ask you to read the figures shown on line 7 of that return? A. $4,910.94.

Q. And the difference? A. The difference or the deficiency in tax for 1949 is $14,746.44.

Mr. Pierpoint: Your witness, Mr. Fennelly.

The Court: Mr. Fennelly, would it bother you if you withheld your cross examination until tomorrow morning?

Mr. Fennelly: No, not at all, your Honor.

The Court: Very well.

The attorneys in the matter which I am going to have a hearing on starting at 4 o'clock have just come in, at least some of them have, and I don't want to hold them up any longer than necessary, and I would like to take a look at some of the papers, and particularly their briefs, before I listen to their argument.

We will adjourn now, ladies and gentlemen, until 10.30 tomorrow morning. Remember the instruction, don't talk about the case and don't be looking for any evidence in the newspapers about it, and keep your minds completely open until all the evidence is in and the case is submitted to you, if we reach that point, with the instruction of the Court. 10.30 tomorrow morning.

(Adjourned to Friday, May 7, 1954, at 10.30 a.m.)

(2005) New York, May 7, 1954,
10.30 a.m.

(Trial resumed)

The Clerk: If there are any witnesses present in the court room at this time, they will please retire to the witness room.

Albert Sohn—for Government—Cross

ALBERT SOHN, resumed.

Cross Examination by Mr. Fennelly:

Q. Mr. Sohn, did you appear before and testify before the grand jury that returned the indictment in this case? A. I did, sir.

Q. Now, you told us yesterday that you prepared, I believe, this computation of tax— A. That is right.

Q. —as claimed by the Government for the year 1946. And from what was it, again, that you prepared your computation? A. From Exhibits 363 and 364 in evidence.

Q. Were those net worth statements and businesses prepared by the accountant who preceded you on the stand; is that right, from the Government? A. That is correct.

(2006) Now, on Mr. Costello's 1946 income tax return there are some additional figures where you stopped on the one that you prepared, are there not? A. Will you repeat that again, please?

Mr. Fennelly: Would you read the question?

(Question read)

A. There are, sir.

Q. Now, will you please take a pencil and insert on the tax that you have prepared the figures on Mr. Costello's return indicating the taxes that had been paid by him to the Government for the year 1946?

Mr. Pierpoint: Objection, your Honor.

The Court: Let me see it, will you, please?

Mr. Fennelly: They stop here (indicating), and the figure that I want him to put in are the taxes that have been paid.

Colloquy

The Court: I will hear you on that.

Mr. Pierpoint: Well, your Honor, that is the exhibit that has gone in evidence. To begin with, I should think additional figures, if Mr. Fennelly wants them, could be put on an exhibit that he can put in evidence.

Mr. Fennelly: Well, if you give me—one—have you got one of those '46 forms, blank? I will have him make a new one for me.

(2007) Mr. Pierpoint: In the second place, your Honor, if I am correct in the figures that I think he is referring to, this witness testified from line 7 of the return, which is the computation of the return on Government's Exhibit 4, the defendant's tax return for 1946, and the comparisons he made from the figure on line 7 on his tax return. The figure on line 7 on Government's Exhibit 4 is the tax as computed by the taxpayer for this year covered by the indictment.

The Court: Let me see it.

(Witness hands to the Court)

The Court: Line 4?

Mr. Pierpoint: Line 7, your Honor, Exhibit 4.

The Court: Let me see the exhibit.

(Witness hands to Court)

Mr. Fennelly: They only did a part of the job, your Honor. They left them—

The Court: That is argument, Mr. Fennelly. Just a minute, now.

I am not sure that I understand your point, Mr. Pierpoint.

— *Colloquy*

Mr. Pierpoint: Your Honor, line 7 is the ultimate item that the Government claims was fraudulently understated.

The Court: Yes. As I understand this witness's (2008) testimony, he has taken all of the figures that appear in 362 and 363.

The Witness: 363 and 364, sir.

The Court: 363 and 364, and using them as base figures, he has made out a return, which has been received as Exhibit 365.

Mr. Pierpoint: Yes, your Honor.

The Court: I also understand that that does not take into account the amount that the—or, I don't know that it does, I don't say that I understand that it doesn't; I am not clear whether that takes into any account the fact that, as to which there is no dispute, in 1946 this taxpayer did pay a tax at the time he filed his estimate.

Mr. Pierpoint: Well, he made estimated payments, your Honor.

The Court: Yes. Well, he made an estimate of tax in 1946, did he not?

Mr. Pierpoint: Yes, your Honor.

The Court: And at the time he filed the estimate he filed a check in payment of the tax as estimated.

Mr. Pierpoint: Yes, your Honor.

The Court: Then later on in 1946—or, 1947, rather, in March, 1947, when he filed his final return (2009) for '46, he showed there his actual income and showed the tax due on it, actual income as he claimed it to be, actually, and he computed the tax on that amount.

Mr. Pierpoint: And that is the item we claim to be fraudulent.

The Court: Very well. But there was a tax paid

on that, and then he got back some money from the Government.

Mr. Pierpoint: Yes.

The Court: What Mr. Fennelly is trying to establish is whether or not this witness, in preparing 365, has made any allowance for any of those figures. I will allow him to explore that possibility, and you may reply if you wish.

Mr. Pierpoint: My only point is that, in terms of the Government's claim, the question is irrelevant.

The Court: Well, that may be. It may turn out to be irrelevant. But its irrelevance is not clear to me now, and you haven't made it so, and that is not your fault necessarily.

Mr. Fennelly: I would hardly think it irrelevant if the Government is claiming that the defendant defrauded them for the year 1946 out of $1,143, when he had paid on the estimated and (2010) withholding tax $22,031.94, from which he got a refund.

The Court: Wouldn't that depend, Mr. Fennelly, on two factors, one, the basis for the estimate on which he paid the $22,000, and the accuracy of the final return in which he purported to show what his actual income was?

Mr. Fennelly: But the jury are entitled to have the facts, and the withholding tax was paid, estimated tax was paid.

The Court: That may be so, but I am only trying to clarify the implication of the statement you just made. I am going to permit you to go ahead and do what you wish to do here.

Mr. Pierpoint: May I make one further request, your Honor, that Mr. Fennelly be permitted to explore it but not to require the witness to make marks on the exhibit already in evidence at this time?

The Court: Oh, no. Mr. Fennelly has asked if there is available a blank form which he can make out as an exhibit of his own, if he wants.

Mr. Pierpoint: We have not one in the court room, your Honor.

The Court: Very well. That is the answer to that.

Q. Mr. Sohn, would you make a reproduction of your (2011) Exhibit 365, please, on the paper, heading it "Income tax return, Frank Costello, 1946"?

Mr. Pierpoint: Your Honor, I certainly don't understand it, and I don't suppose the witness understands what this "reproduction" means. Does he want it word for word, the entire tax return?

Mr. Fennelly: Why don't you let the witness worry about that?

The Court: No, I think it is proper to inquire what you mean by a question.

Q. Will you put down "Income tax return, 1946, Frank Costello"? A. All right.

Q. And will you put down "79 Wall Street Corporation, $7,484.85"? And that is the same as the return—that part of it is the same as the return he filed, right? A. That is correct.

Q. The next figure that you have is $45,664.29, is that right? A. Yes, sir. That includes the omitted item, $18,000.

Q. That includes what the Government claims is omitted income, is that right? A. That is correct.

Q. Will you put that sum down?

Mr. MacMahon: Could the witness speak up? We can't hear him at counsel table at all.

(2012) The Court: Yes. I can't hear you either.

Q. And would you put the total of those down, the sum as you have on your Exhibit 365?

And the difference of the line 5 income between your Exhibit 365 and Mr. Costello's return is based on the assumption that the schedules from which you testified were correct, right? A. That is right.

The Court: Will you keep your voice up, please?
The Witness: Yes, sir.

Q. Would you then put down, the way you did in your exhibit, the amount of tax that you calculated?

Now, will you put down the figures that appear on Mr. Costello's income tax return, the withholding from wages, just as it would appear on a return, and also put down, please, the payments by Mr. Costello in 1946 on his declaration of estimated tax, the amount that he had paid the Government?

Now, on Mr. Costello's return as filed there was an overpayment of tax, was there not? A. Based upon the income reported in the return, there was, sir.

Q. Based upon what you reported, would you make a calculation and tell us whether or not there would be an overpayment, too? A. There would not, sir.

(2013) Q. Will you just make the same calculation that is made on this tax return—

The Court: Before you go into that, would you tell me, Mr. Witness, whether or not the figure which you have put down here, withholding from wages and payments on declaration of tax, are those figures—have those figures been taken into consideration in Exhibits 363 and 364?

The Witness: Yes, sir, between the—to the extent that they constituted taxes paid.

The Court: Yes, and are they reflected, therefore, in these figures which you have put down here on your exhibit, which you say was taken from 363 and 364?

The Witness: Yes, sir, they are.

The Court: And is it going to throw your calculation out or is your calculation going to be in any way distorted by applying them again now as you have been requested to do by Mr. Fennelly?

The Witness: They will be distorted, sir.

The Court: Very well.

Q. Let's see— A. I haven't finished (indicating).

Q. The fact is that you contend, is it not, that Mr. Costello owed tax based on your schedules of $9,482.50 for the year 1946 instead of the amount reported in his (2014) return of $8,338.72, or a difference of $1,143.86, is that right? A. That is right, sir.

Q. Actually, is it not a fact that Mr. Costello paid, withholding tax and his payment on his estimated tax in the year 1926, had paid to the Government $22,031.94; isn't that right?

The Witness: May I have the question repeated?

(Question read)

Q. (Continuing) —as shown by Exhibit 4, Mr. Sohn, right here.

Mr. MacMahon: Is that 1926?

The Witness: 1946.

Mr. Fennelly: 1946. Excuse me, 1946. I made a mistake. 1946.

A. That is what Mr. Costello had paid during the year—

Q. That is right. A. —but it isn't his—

Q. That's all. I didn't ask you—

Mr. MacMahon: May the witness finish?

The Court: Let the witness finish.

Mr. MacMahon: And speak up, please, Mr. Sohn.

A. (Continuing) He had paid in $22,031.94 during the year, but he had—

Q. That's right. A. —claimed and received credit.

(2015) Q. Now—

The Court: Let him finish, please, Mr. Fennelly.

Mr. Fennelly: All right.

The Court: You may finish.

Mr. Fennelly: Let him finish.

A. (Continuing) He had claimed and received credit for the sum of $13,693.22 and had said in his return that his tax liability for the year, based on the income reported was $8,338.72, and that is the figure used in arriving at our deficiency.

Q. We have heard all about that now and I think we all know it, and that return was filed in 1947 for the year 1946, was it? A. That is correct.

Q. And it is true, is it not, that in the year 1946 Mr. Costello had paid the United States Revenue Bureau the $22,031.94; that is a fact, isn't it? A. It is a fact that he had paid it but the Government didn't keep it all.

Q. I know that, but it is a fact that he paid it, isn't it?

The Court: Well, now, there is no sense spending any more time on it. He has said at least three or four times he paid it and got some of that back.

(2016) Mr. Fennelly: I know that. I have shown myself he got some of it back in a refund.

Q. What I want to know, Mr. Sohn: Would you tell me, on the basis of claimed tax due by Mr. Costello, would he not have been entitled to a refund on your figures?

The Court: Out of what?

Mr. Fennelly: For 1946 income tax.

The Court: Out of $22,000 paid?

Mr. Fennelly: That is right.

The Court: All right. I just want to get the question clear for the witness.

Mr. Fennelly: That is what I am trying to develop on Mr. Sohn's own figures on Exhibit 365.

Q. Will you tell us how much Mr. Costello would have been entitled to as a refund? A. These are your figures, not mine.

Q. Is this your figure— A. Yes.

Q. —$9,000? A. The $9,482.58—

Q. All I am asking you—. A. (Continuing) —is my figure, yes.

Q. —asking you to do, Mr. Sohn, and you are an accountant and I assume you can add and subtract, will you tell us, based on your income tax return which you have prepared, the amount of overpayment that you (2017) calculated based on those figures you have, taking your figure of $9,482.58?

Mr. Pierpoint: Your Honor, I submit that if Mr. Fennelly is asking the witness to add and subtract, he should give him the figure. He wants him to add and subtract and not characterize it.

The Court: I think it is very clear that what Mr. Fennelly is asking is this: Take this set of facts,

that at some time in 1946 the evidence shows that the defendant paid in to the Government the sum of $22,000-odd, and he is asking you now to take the—and then later on he got some back because his actual tax as he computed it didn't reach that amount.

Mr. Fennelly is saying to you, take the actual tax as you compute it, compare it with the $22,000 which, concededly the defendant paid, and tell whether or not there would have been a refund due to the defendant in any event, even on your figures.

That is the point of the question?

Mr. Fennelly: That is right.

The Witness: Based on this calculation, the taxpayer would have received or been entitled to a refund of $12,549.36, provided that he had not received the $13,000 in the first instance.

Q. He would have been entitled to a refund of (2018) $12,549.36 based on the tax as you calculated it in your Exhibit 365, isn't that right? A. No, sir.

Q. Didn't you just add it, Mr. Sohn? A. I used my tax figure.

The Court: Maybe you didn't understand the question. Let me see if I can put it to you this way: As I understand the question, and if I am not putting it properly, Mr. Fennelly, I expect you will tell me.

You are being asked to take one fact, that this defendant paid into—filed an estimate of his tax for 1946, and he estimated the tax to be $22,000-odd, and he sent the Government $22,000-odd.

Subsequently he filed a return on March 15, 1947,

which shows a tax of—let me see the exhibit—which showed an actual tax due of $8,300, right?

The Witness: That is right.

The Court: Mr. Fennelly says that the Government now says that that computation upon which the actual tax of $8,300 was arrived at was incorrect, and you say that the tax should have been the amount that appears in 365, $9,482.

Mr. Fennelly says, assuming that Costello had filed a tax as you computed in the amount of $9,482, is it not a fact that he would be entitled to receive (2019) back from the Government in 1946— Now, I assume that all this happened in 1946— Is it not a fact that he would have been entitled to a return from the Government of the difference between the $9,000 tax you computed there and the $22,000 that he actually paid in?

Does that correctly state the proposition?

Mr. Fennelly: Yes.

The Court: Does the Government have any objection to that summary?

Mr. Pierpoint: No.

The Court: Very well.

The Witness: Under those circumstances, the refund would have been—there would have been an overpayment, that is, of $12,549.36.

Q. Now, I noticed on, I believe, Mr. Costello's income tax return for '46, Exhibit 4, that I believe a deduction had been claimed of $1,000. A. I don't find the deduction you are referring to, sir.

Q. For dependents. A. Oh.

Q. You see, I don't know anything about this business, I am not an expert, so if you will, just bear with me.

A deduction for dependents, is that right? A. That is the exemption, sir, that you refer to.

Albert Sohn—for Government—Cross

(2020) Q. Exemptions? A. Yes.

Q. Exemptions, that is the word. A. Yes.

Q. Now, in your return as you prepared it, you allowed only $500, is that right? A. That is correct, sir.

Q. Now, did whoever prepared the tax return of Mr. Costello, Exhibit 4, for 1946, make an error in claiming $1,000 instead of 500? A. They did, sir.

Mr. Fennelly: And I point out, your Honor, that the bill of particulars raises no claim about the matter of exemptions or deductions by the way.

Q. Now, then, in Mrs. Costello's income tax return for 1946 she did not make any deduction, did she? A. She claimed no exemptions, sir.

Q. No exemption? A. That is right.

Q. So Mrs. Costello would be entitled to a rebate, then, wouldn't she, on the— A. She is, sir, on the basis of this exemption of $500.

Q. All right. Now, tell us how much she is entitled to back. A. Well, if I can have the tax computation schedule, I will compute it for you.

Q. (Hands to witness.) A. The refund due Mrs. Costello would amount to $204.25 on the basis of this allowance.

(2021) Q. The 1946 return? A. That is right.

The Court: What is that amount?

The Witness: $204.25.

Mr. Fennelly: Could I have Exhibit 362 and 363?

(Mr. Pierpoint hands exhibits to Mr. Fennelly.)

Q. Now, the drawings of a partnership, it has been testified to by a certified public accountant, has no relationship

to the income from the partnership; that is, they are different? A. That is correct.

Q. Is that right? A. That is right.

Q. And a man may draw from a partnership in a given year more than his share of the profits for that year; isn't that right? A. That is right.

Q. And the amount that he drew over and above his share in the profits for a given year would be a non-taxable receipt, wouldn't it? A. It would be a return of capital; and, therefore, a non-taxable receipt, yes.

Q. Or it might be not necessarily capital, it might be something that he had earned a year before that he hadn't drawn down, right, or would you then characterize that as capital? A. I would characterize it as capital.

(2022) Q. All right. I show you Government's Exhibit 150 and ask you if that does not indicate that—the heading is Frank Costello Partner Account, and that is the Louisiana Mint ledger sheet—if that does not indicate that for 1946 Mr. Costello had drawn $25,875. A. I could not answer that without seeing the drawing account, sir. There is no indication here that it constitutes drawing; it is simply a debit to his partnership account.

Q. Doesn't that indicate that it was drawn when it is debited? A. Well, it could have been any number of other items that may have been debited to an account. I believe, sir—

The Court: No. The question you were asked was, doesn't it indicate that he drew it from the company?

The Witness: Not necessarily.

The Court: You were not asked to characterize it.

The Witness: Not necessarily, sir.

The Court: Your point is that it may have been merely debited, but the account didn't receive it?

The Witness: It may constitute adjustment debits, other than receipts or disbursements during the year.

The Court: That is your answer. Of itself, (2023) that exhibit does not show that that was withdrawn, is that your point?

The Witness: That is correct, sir.

The Court: Very well.

Q. But it could indicate that he received it, too, couldn't it? A. It may, if we had the—

Q. His account indicates that there was drawn on his account $25,875; is that right? A. No, sir.

The Court: Hasn't the witness just said that it doesn't show that, that all it shows is a debit against the account?

Q. His account is debited with that amount of money, is that right? A. It is debited with a sum of money, sir, yes.

Q. Of $25,875? A. That is right, sir.

Q. Now, the witness Murphy, the certified public accountant from New Orleans, testified that he could not tell whether a part of that money had been drawn in the last month of 1945 or in 1946.

Now, I show you Mr. Murphy's cash statement of Louisiana Mint Company to Mr. Costello for December 1945, and call your attention to the balance as of December 31, 1945, of $66,488.22; right? A. That is correct.

Q. And that account indicates that there were no (2024) drawings in the month of December, isn't that right?

Mr. MacMahon: What account are you referring to? I don't understand what account Mr. Fennelly is referring to.

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Mr. Fennelly: I am referring to Defendant's Exhibit X, which is the certified public accountant's, Murphy.

Mr. MacMahon: Kastel's account?

Mr. Fennelly: This is Louisiana Mint.

Q. The Louisiana Mint Company cash receipts and disbursements for the month of December, 1945, the company. Now, will you—which was sent to Mr. Costello, on which a letter to Mr. Costello appears as part of the exhibit. Now, there are no drawings indicated for the month of December, 1945, on that cash report of Mr. Murphy, are there? A. There are none reflected in this particular report, no, sir.

Q. All right. And the balance of cash as of December 31, 1945, is how much? A. $66,488.22.

Q. And that same amount appears on the opening of the January 1946 statement, does it not, as the opening balance? A. Yes, sir, it should agree.

(2025) Q. That is right. A. This (indicating) is December 31st, and this (indicating) is January 1st, and—

Q. That is right, they should agree. Now, in 1946 how much did Costello receive on his income tax return which he reported from Louisiana Mint Company? A. His distributive—

The Court: Pardon me just a minute. Will you read the question?

(Question read.)

The Court: Do you want to reframe that, Mr. Fennelly?

Read it again. It is just a little confusing to me—how much did he receive on his income tax return, you asked him.

Mr. Fennelly: I withdraw the question.

Q. Would you look at Mr. Costello's income tax return for 1946 and tell us what was reported in there as having been received from Louisiana Mint Company?

The Court: All right.

A. What is reported here is his distributive share of profits, not what he had received necessarily.

Q. That is right. That is the point I am coming to. Thank you, sir.

All that would appear in the income tax return of what (2026) he drew would be his taxable share of the profits; right? A. That is right. That is right, sir.

Q. And that share appears in his tax return for 1946, Government's Exhibit 4, and also in Defendant's Exhibit O, does it not, the Louisiana Mint Company return for the fiscal year ending November 30, 1946, on the last page, Frank Costello share, $19,335.25; right? A. That is right, sir.

Q. Now, will you deduct, please, the $19,335.25, which appears in his income tax return as his taxable share of the profits of Louisiana Mint, from this item appearing on Frank Costello partner account, Government's Exhibit 150, which is the sum of $25,875, and would you let me have that figure? A. $6,542.75.

Q. Now, if Mr. Costello received this $25,875 as shown by his partner account of Louisiana Mint Company in 1946, then your non-taxable receipts column on Government's Exhibit 363 should be increased, should it not, by the amount of $6,542.75? A. No, sir.

Q. Did you listen to the question?

Mr. Fennelly: Would you read it to him again?

The Court: Does that question start off with the word "if?"

Mr. Fennelly: That is right.

(Question read.)

A. My answer to that, sir, is, with respect to this schedule, no, sir, it should not.

Q. Well, that schedule is supposed to show non-taxable receipts, isn't it? A. Yes, sir.

Q. My question to you is, if Mr. Costello received the $25,875 as shown on Government's Exhibit 150 during the year 1946, wouldn't he have a non-taxable receipt of the difference between what his taxable interest was in Louisiana Mint for that year and the sum of $25,875? A. Sir, that item is reflected in the net worth schedule by the decrease in the capital account. The capital account has decreased by virtue of the disbursements in excess of earnings for the period.

Q. Now, Mr. Sohn, you have a column here of non-taxable receipts, haven't you? A. Yes, sir, we do.

Q. Wouldn't it be a fact that if Mr. Costello received during 1946 the $25,875, that he would have a non-taxable receipt of the difference between the 19,000-odd dollars which was his taxable interest in the profit of the partnership and the 25,000? A. Sir, that question has to be answered in (2028) relationship to the schedule submitted, and it has to be—I cannot—

Q. Mister, just add it, would you? A. Add what?

Mr. MacMahon: Oh, your Honor, may the witness answer the question?

The Court: Let him answer.

Q. Go ahead. A. Sir, what you have discussed here is a distribution in excess of earnings for the period, and

what we are trying to determine, therefore, is whether Mr. Costello received due credit for this distribution in excess of what had been reported on his return.

Q. That is what I am trying to do, yes. A. Correct. And the answer to that is that he has received due credit by virtue of the net worth statement which shows decline in the capital account. Now, by distributing moneys in excess of earnings the capital account will decrease, and the decrease in the net worth is indicative of funds available to the taxpayer, or to the defendant, and so it is properly accounted for in this statement.

To put it in non-taxable receipts would give it to him twice, sir.

Q. Why do you put anything in non-taxable receipts? (2029) A. Because we do have items that do not appear in the net worth or in any other part of the statement.

Q. But you can add it into the net worth?

The Court: Do you mean whether it is physically possible to do it? Under the system that was used to prepare 363 and 364, with the addition of this figure of some six thousand, or almost six thousand dollars, distort the end result?

The Witness: No, sir.

Q. You would be giving him credit for it twice if—

The Witness: Yes, I am sorry. I think I misunderstood your question.

The Court: On the basis and on the theory on which these Exhibits 363 and 364 have been prepared, would the addition of this difference between 19,000 and the 25,000 cause a distortion in the ultimate figure if you were to add it as Mr. Fennelly requests you to do?

The Witness: Yes, sir.

Mr. MacMahon: Would you speak up, please?

Q. And the distortion—

The Witness: Yes, sir.

The Court: Don't be so modest. Speak up loud enough so that that man at the last table can hear you, and it won't hurt if I hear you, too. Up to now I haven't had much success in that.

(2030) But it would cause a distortion because the 6,000-figure would get in twice, according to your calculation?

The Witness: That is correct.

The Court: Very well, all right.

Now, let us get along.

Q. That's fine.

The Court: You may go along from there if you wish.

Q. Now, Mr. Sohn, would you show me the place in this schedule where that figure is reflected? A. It will not have the same figure because we are not talking about the—

The Court: That is not what you were asked. If you would only try to answer the question. You were asked the place where it was reflected.

A. Mr. Fennelly, in our net worth statement we have an item called Investments, and we are referred to Schedule B.

Q. Yes. A. And on Schedule B we have the details of our investments.

Q. Yes. A. And there we have investment in Louisiana Mint Company, and we show our investment at the beginning of the year '46 and our investment at the end of the year. And it is in these figures (2031) that we take into account declines in our capital account by virtue of distributions in excess of earnings.

Q. Yes. Tell us what figure you have for Louisiana Mint partnership. A. As of 1-1-46—

Q. Yes? A. —we have as of 1-1-46 we have an investment of $17,636.40. As of the end of the year, 12-31-46, we have $16,721.65.

Q. And according to the partnership account of Mr. Costello, my question to you is, if he drew down the 25,000 in the year 1946 he would have still a non-taxable receipt of the sum of $6,542 which you have not included in the $17,636.40. A. I don't agree with you, sir.

Q. Well, show me where you have included it.

The Court: Well, he will have to do it after the recess.

(Recess.)

(Jury present.)

Mr. Fennelly: Is there a pending question?

(Record read.)

A. If I may have the exhibit pertaining to the partnership distribution account of Frank Costello for Louisiana Mint Company, I will make that computation, sir.

(Mr. Pierpoint hands exhibit to the witness.)

(2032) A. (Continuing) Now, Mr. Fennelly, the partnership capital account indicates a distribution of $25,875,

and now we know it is a distribution because we have the distribution account to refer to.

Q. In 1946? A. In 1946. However, we have an item in January of 1946 of $10,125—

Q. Yes. A. —which is characterized as funds distributed in December and January. So that it appears, and I believe we have testimony in this case to indicate, that not the entire $10,125—was not—distributed in 1946, but a portion of it was distributed in 1945.

Q. Now, Mr. Sohn, were you here throughout the testimony? A. No.

Q. I see. I was, and Mr. Murphy, the certified public accountant, testified that he could not tell whether or not it was distributed part of it in 1945 or whether it was all distributed in 1946, and for that reason, I take Mr. Murphy's own cash receipts and disbursements, which I will go over with you again, and I show you Mr. Murphy's cash receipts and disbursements of Louisiana Mint Company, Defendant's Exhibit X.

Will you look at it and tell me whether you find any distribution, as appears on Mr. Murphy's own sheets, who was the certified public accountant for Louisiana Mint Company. (2033) A. This report doesn't show any such distribution. However, the books do.

Q. And that is the report that Mr. Murphy sent to Mr. Costello, is it not? A. Yes, sir.

Q. With the letter attached to it, is that right? A. Yes, sir. However, the books do show the distribution, Mr. Fennelly.

Mr. MacMahon: Will you speak up, Mr. Sohn?

The Witness: I say, the books do show the distribution.

Q. And Mr. Murphy's statement to Mr. Costello shows there was no distribution made in 1945, isn't that right,

in the month of December? A. It doesn't show positively. In other words, it is not an affirmative statement that there was no distribution.

Q. Oh. A. No distribution appears on the schedule.

Q. If it does appear on Mr. Murphy's schedule, Defendant's Exhibit X, show it to me, won't you? A. I say, it doesn't appear on the schedule.

Q. Let us assume, then, that the difference between the $25,875 on the partnership account, that the difference between that and his taxable interest in 1946, which was $19,335.45, and the resulting figure is $6,000-what? A. $6,539.75.

(2034) Q. $6,539.75? A. That is right. That is right.

Q. Now, then, sir, would you add that $6,539.75 to your non-taxable receipts under the 1946 column on Exhibit 363? And then will you go through the same arithmetical process of addition and subtraction that has been gone through on that schedule?

The Court: I lost you at the first turn. I don't know what the arithmetical procedure is and I don't know what schedule you are talking about.

Q. On your schedule—

Mr. Fennelly: Excuse me. Perhaps we had better try to explain it.

Q. On the schedule there has been deducted—

The Court: You are talking about an exhibit, Mr. Fennelly?

Mr. Fennelly: Exhibit 363.

The Court: If you are, identify it.

Albert Sohn—for Government—Cross

Mr. Fennelly: Exhibit 363.

The Court: All right.

Q. You have an item, non-taxable receipts. A. That is right.

Q. And you have now added the sum of $6,539.75 under the column December 31, 1946, right? A. Yes, sir.

Q. On your schedule you have deducted the non-taxable (2035) receipts from the total current receipts as shown by the schedule, right? A. Yes, sir.

Q. Now, first of all, adding the $137.80 shown as a non-taxable receipt in that column to this $6,539.75 gives you how much? A. $6,677.35.

Q. On your schedule you are deducting, are you not, non-taxable receipts from total current receipts, right? A. That is right.

Q. Would you please go ahead and make the deduction? And that gives you how much? A. $62,473.75.

Q. Instead of the $69,013.50, right? A. Right.

Q. Then on your schedule, Exhibit 363, in this column, you have deducted the gross income of Loretta Costello, right? A. Yes, sir.

Q. Will you deduct that same figure from the total you have just given me? A. Yes.

Q. And how much is that? A. $46,609.39.

Q. And that would be opposite the figure, the gross income of Frank Costello as claimed by the Government, is that right? A. That is right.

Q. And that is $46,609.39, right? A. That is right.

Q. Now, it was the figure of gross income as claimed by the Government in the sum of $53,149.14 which was (2036) reflected on your schedule, Exhibit 363, that you used to make your computation of his tax in your Exhibit 365, wasn't it? A. Yes, sir.

Q. Will you make a computation of what the tax would

be if Mr. Costello's gross income was the sum of $46,609.36, which would be the sum after reflecting this item?"

Mr. Pierpoint: "I object to the characterization of the item, your Honor.

The Court: "I will allow it. Go ahead.

(A pause.)

Q. Now, then, making that computation, would you tell me what the net income would be?" A. The net income, the revised net income, based on your figures or the figures you just gave me, would be $19,589.64 or 67.

Q. What was the amount that Mr. Costello reported in his income tax return? A. $23,673.90.

Q. Or, roughly, some $4,000 more than that computation, right? A. Based on those figures, yes, sir.

Q. And will you tell us what the tax would be based on the computation I gave you? A. Based on your computation, sir, the tax would (2037) be $6,876.29.

Q. And that is less than the tax that Mr. Costello reported in his 1946 income tax return, is it not? A. That is right, sir.

Q. In your computation of Mr. Costello's 1946 income tax return, which is your Exhibit 365, did you allow Mr. Costello some additional contributions which he had not claimed in his original income tax return? A. Yes, sir, I allowed him—

Q. Go ahead. A. I allowed him the contributions that he had not previously claimed and that—

Q. In what sum? A. $1,491.10. Those were contributions in our expenditures that—

Q. And did you allow any additional interest in your computation of Mr. Costello's 1946 income tax return? A. I did allow him additional interest.

Q. How much? A. Which he had not previously claimed.

Q. How much? A. In the aggregate of $4,981.85.

Q. Did you allow him additional city sales tax? If so, how much? A. Yes, sir, in the amount of $69.27, based upon the expenditures that have been computed previously in the case.

Q. Did you make an allowance for legal fees paid, (2038) which Mr. Costello had not claimed in his income tax? A. Yes, sir, I did.

The Court: Will you keep your voice up, Mr. Sohn?

The Witness: Yes, sir, I did.

Q. In what amount? A. $10,000.

Q. Is any allowance made in these schedules for the legal fees paid to George Wolf, Esq., who testified here? A. No, sir. There is no allowance made for those fees. There is no evidence, or knowledge on my part that the fees were made in connection with anything that might constitute it as a deductible item on the tax return.

Q. Mr. Wolf did testify that he rendered service to Mr. Costello and was paid fees, did he not? A. I am not familiar with Mr. Wolf's testimony, sir.

Q. I see. Mr. Wolf testified, didn't you know, that he prepared these income tax returns? Did you know that? A. I am not familiar with Mr. Wolf's testimony. However, I will say the rendering of service, of legal services, does not in and of itself constitute an item as a deductible one. Service must be in connection with—

Q. Must be in connection with a business, must it not? A. It must be in connection with a (2039) preservation or maintenance of income or income producing property.

Q. Or for preparing tax returns? A. Or in the preparation of tax returns.

Q. And then it is deductible? A. To the extent that the service covers those particular services—

Q. Yes. A. —the item is deductible.

Q. And the basis that you say you did not include Mr. Wolf's fees as a deduction was because you have no knowledge of Mr. Wolf's testimony, is that right? A. Sir, I discussed the items of expenditures which have been developed in this case with the agents who have been present in the court through the trial—

Q. I don't want—

Mr. MacMahon: Let the witness answer, please, your Honor.

The Court: Yes.

Mr. Fennelly: I don't want his discussion, your Honor, because I shall object.

The Court: Oh, no. That is right.

Mr. Fennelly: He said he had a discussion. That is all right.

The Court: But he has stated he discussed it.

Mr. Fennelly: Yes.

(2040) The Court: Now, as a result of that discussion?

The Witness: As a result of that discussion, I have arrived at the conclusion that the items allowed, that I have allowed in Mr. Wolf's corrected tax liabilities, as determined by the Government, are the only items to which he is entitled to a deduction.

Mr. MacMahon: The agent said Mr. Wolf. I think he meant Mr. Costello.

The Witness: Mr. Costello.

Q. You yourself haven't read Mr. Wolf's testimony? A. I have not.

Q. And did you—did I understand you correctly that you didn't know that Mr. Wolf had testified that he had prepared these income tax returns? A. I am not familiar with the testimony to that effect or as regards other things, but I do know, of other sources of knowledge that Mr. Wolf did prepare these tax returns.

Q. Now, on the basis of the computation that you worked out for me before on Mr. Costello's '46 return, would you calculate what tax, or did you give me that, that Mr. Costello would have paid on the basis of having received that $6,000 item in 1946? Did you compute the tax? A. I believe I did, sir, and I believe I gave it ((2041) to you before.

Q. What was the figure again? A. $6,876.29.

Q. Based on the figures that I had given you for 1946, Mr. Costello would be entitled to a refund, would he not? A. Yes, sir, but I should like to point out that in those figures that you have given me, there is, in one instance, duplication to the extent of $914 and to the extent of $5,625 there is a difference of position taken between yourself and myself.

Q. You mean you disagree with some of the exhibits in evidence, don't you? A. No, sir. I believe the exhibits in evidence show that the distribution by Louisiana Mint Company of the sum of $5,625 to Mr. Costello was made in December, 1945.

Q. I have shown you Mr. Murphy's, who was the certified public accountant, his cash receipts and disbursements statement, which indicates that no disbursements was made in December 1945. I have shown it to you three times. Did you look at it? A. I did, sir.

Q. And that is what it shows, isn't it? A. Not what the books show.

Q. That isn't my question, Mr. Sohn. Would you mind just answering the question? A. Yes.

(2042) Q. Isn't it a fact, Mr. Sohn, that that is what Mr. Murphy's exhibit shows, and that was the exhibit that he sent, Mr. Murphy sent to Mr. Costello, wasn't it? A. Yes, sir.

Q. Based upon that, Mr. Costello would be entitled to a refund for the year 1946 in the sum of how much money? A. Sir, I cannot answer that question for this reason: Now, the figure you gave me to add to our original computation was one of $6,539.75, and you alleged that that figure is a figure of non-taxable income to which Mr. Costello should be given credit.

However, that figure consists of two parts. It consists, firstly, of $5,625—

Q. Mr. Sohn, all I asked you to do was to make—

The Court: Just a minute, Mr. Fennelly. You asked him for this figure and he is trying to tell you he cannot give it to you, and he is trying to explain to you why he cannot give it to you, and I think he ought to be allowed to do it.

You may inquire—

Mr. Fennelly: It is perfectly obvious he can make a calculation because that is all I asked him for.

The Court: I think that is so. This is his (2043) reason for not doing it. You may come back to that, to what you think is appropriate.

The Witness: You asked me to make the calculation on the basis of $6,539.

Q. That is right. A. Which you say constitutes non-taxable receipts. However, I tried to show you before—

Q. Mr. Sohn, all I want to do, for the purpose of my question—

The Court: Stop.

Q. —is to have you—

The Court: Please stop.

Q. —assume it is non-taxable receipt.

The Court: You are now arguing.
You may tell us.
And I am not going to have an argument.

The Witness: That figure already includes a sum of $914 which is represented in our net worth statement by virtue of a decrease in net worth, and interpreting that decrease we are, in effect, saying Mr. Costello had $914 available to him by virtue of excess drawings during 1946. So that we have already given him $914 of that $6,500 figure that you have furnished me with.

Q. You told us you had given him all before. (2044) Now you are down to $914. A. No, sir. We had given it all to him, but I am working with your figures now.

Q. Mr. Sohn, will you just please make the calculation and tell me what refund, assuming what I told you to be so, would Mr. Costello be entitled to? A. The figure you seek, sir, is $1,462.83.

Q. Now let us go back for a moment about whether or not this money was paid out. Mr. Murphy's cash balance as submitted to Mr. Costello for 1945 which shows that no disbursement had been made during the month of December, 1945, his cash balance would be erroneous, wouldn't it? A. As of what date, sir?

Q. As of December 31, 1945. A. May I have the question repeated, please?

(Question read.)

A. Yes, sir, it would.

Q. If it had been paid out, it would have to appear on there, wouldn't it, or the cash balance would be incorrect, wouldn't it? A. I believe so, sir.

Q. And that is the same balance that is carried forward on the January 1946 statement, is it? A. It is.

(2045) Q. Now, Mr. Sohn, coming to the statement that you have prepared as to Mr. Costello's tax based on the assumption of these Exhibits 362 and 363, you did make him an allowance of interest, did you not? A. I did, sir.

Q. Which he had not claimed in the sum of $13,768.74? A. He had claimed it in the wrong year, sir. I made an adjustment giving it to him in a correct year.

Q. He had claimed it for some prior year and you said it should be claimed in this year, is that right? A. That is correct, sir.

The Court: This year being what year?

Mr. Fennelly: '47. Excuse me, your Honor.

The Court: 1947. Very well.

Q. Now, Mr. Sohn, all of these, so I won't spend any more time with you, all of these tax returns that you prepared are based on the assumption that the figures and conclusions in the schedule prepared, 362 and 363, are correct; right? Is that right? A. I believe you have the wrong exhibits. They are 363 and 364, sir.

Q. I thought it was 362, too. Isn't it 362? A. The tax computations are not—

The Court: They are all added together, aren't they? (2046) 362 set up the base years '37 to '45.

The Witness: That is right.

The Court: And, then, taking the net worth of '46, you do some calculations in Exhibit 363 for the prosecution years, and 364 is the schedule which the Government claims reflects what was the true income of the defendant in the prosecution years.

The Witness: That is correct, sir.

The Court: Very well.

Q. And if their schedules are incorrect and wrong, your tax calculations based on them would be also incorrect and wrong to the extent that those schedules are wrong; right? A. To the extent, that is correct.

Q. That is right, isn't it? A. Yes, sir.

Mr. Fennelly: That is all.

Redirect Examination by Mr. Pierpoint:

Q. Now, Mr. Sohn, we are going to get back into this business of the tenths again, but first of all I want to ask you whether you know whether the accountant for the Louisiana Mint Company was ever permitted to inventory the cash of the Louisiana Mint Company?

Mr. Fennelly: I object to it.

(2047) The Court: Overruled.

A. He stated that he never was.

Mr. Fennelly: I object to it, your Honor, as hearsay. The witness was here and he could have testified and let me cross examine him about it.

Mr. MacMahon: He did.

The Court: I beg your pardon?

Mr. MacMahon: He did so testify.

Mr. Pierpoint: He so testified.

Mr. MacMahon: He so testified.

Mr. Fennelly: I have no recollection of any such testimony.

The Court: Well, so there need not be any mystery about it, if it was testified to you can point it out in the transcript.

Mr. Pierpoint: Should I do that now?

The Court: I think this is the time to do it.

Mr. Fennelly: Your Honor, I have another question I would like to ask of the witness in connection with the grand jury, if I may do it now while they are waiting for that.

Mr. MacMahon: Your Honor, I submit that that be taken up in recross, if he wants to.

Mr. Fennelly: That is all right.

The Court: Go ahead, you may ask it now. I (2048) don't see any harm in it. It may save time.

By Mr. Fennelly:

Q. Did you testify before the grand jury to the same thing that you have testified to here before today, that is, the grand jury that returned this indictment?

Mr. MacMahon: Your Honor, I object to the question.

The Court: Sustained.

Q. Did you testify before the grand jury that returned this indictment in connection with the 1949 income tax return what the deductions were to be taken—

Mr. MacMahon: Your Honor—

Mr. Fennelly: Excuse me a minute.

The Court: He has not finished yet.

Mr. MacMahon: Mr. Fennelly paused, sir, I am sorry. I thought you had finished.

Q. (Continuing) —in arriving at the computation of tax set forth in the indictment?

Mr. MacMahon: Your Honor, I object to the question; the same ground.

The Court: Sustained.

Q. Did you testify before the grand jury as to the deductions which were to be allowed to Mr. Costello for the 1949 income tax return?

Mr. MacMahon: Same objection, your Honor.

(2049) The Court: Sustained.

Q. On what did you base your testimony before the grand jury? Any schedules or exhibits?

Mr. MacMahon: Same objection, your Honor.

The Court: Sustained.

Q. Did you testify before the grand jury as an expert?

Mr. MacMahon: Same objection.

The Court: Sustained.

Mr. Fennelly: That is all.

The Court: Very well.

Mr. Pierpoint: Your Honor, at page 430 of the transcript—

The Court: Just show it to Mr. Fennelly. Tell us what it is, and point it out to Mr. Fennelly. What is it? Read it.

Mr. MacMahon: Read it.

Mr. Pierpoint: The question was asked Mr.

Murphy with respect to Louisiana Mint: "Now, Mr. Murphy, do you know where the cash was kept?

"A. I do not.

"Q. Did you ever count the cash? A. I did not."

By Mr. Pierpoint:

Q. Now, Mr. Sohn, I show you Government's Exhibit (2050)-152 in evidence, which is a journal sheet from the books of the Louisiana Mint Company that were kept by Charles B. Murphy, and at the top of the page will you read the item where my finger indicates?" A. Line 3?

Q. Line 3.A "Distributed in December, 1945, $25,000."

Q. And based on the books of Louisiana Mint Company, journal page 9, will you explain again, Mr. Sohn, how you reflected that item on the books of $6,500? A. The distribution, according to the journal page 9 that I have before me, of $25,000 was made to all partners. Mr. Costello's share of that distribution was 22½ per cent, which amount —which amounts to $5,625.

Now, with the evidence of these journal pages I was able to compute the corrected capital account of Mr. Costello as of the beginning of 1946, and that capital account is reflected in our net worth statement as $17,636.40.

In effect, what we did is to take his capital account as of the close of the last fiscal period and subtract from that all distributions of cash made since the close of the books to the end of the year, giving him credit for all cash distributions.

(2051) And the balance arrived at by subtracting the cash distributions from the net capital as of the close of the books date is the new capital account or the capital account as of the end of the year which is reflected in our net worth.

The Court: And where does that appear?

The Witness: Now, that appears in Schedule B of Exhibit 363. It is 363-B.

The Court: And the net worth on what date?

The Witness: As of 1-1-46, January 1, 1946.

A. (Continuing) Now, by taking the capital account of the Louisiana Mint Company applicable to Mr. Costello at the beginning of '46 and comparing it with the capital account as of the close of '46, we find a decline in the capital account or a decrease which is reflected in the decrease in his net worth and interpreted—

Mr. Fennelly: Would the witness refer to exhibits, please, so that I can examine him on the same subject matter?

The Court: Yes.

The Witness: I am reading—

The Court: You are talking about some exhibit, are you not?

The Witness: 363-B, Mr. Fennelly.

(2052) A. (Continuing) Now, that decrease in net worth reflected as the result of putting our capital account on a net worth as of the beginning and end of the year, is interpreted to mean that Mr. Costello had so much moneys available, the moneys measured by the difference between the net worth at the beginning and the net worth at the end of the period.

So, in effect, all distributions are taken care of or accounted for in our net worth statement.

Mr. Pierpoint: No further questions.

The Court: Very well.

Albert Sohn—for Government—Recross

Recross Examination by Mr. Fennelly:

Q. Well, are you a certified public accountant? A. No, sir, I am not.

Q. And Mr. Murphy from New Orleans, he was, wasn't he? A. Yes, sir, he was.

Q. And he taught at the university? A. I understood him to say so, yes, sir.

Q. Now, Mr. Murphy would have to get the figures as to cash, to be reflected, from the books, would he not? He would have to get receipts and he would have to get the disbursements, would he not? A. I assume those figures are taken from the books, sir, yes.

(2053) Q. Now, then, tell us again what you put in your schedule as to the net worth of Mr. Costello's interest in Louisiana Mint, and point out where your figure is, would you, giving me the exhibit number? A. On Exhibit 363-B—

The Court: Wait just a minute here. All right.

A. Louisiana Mint Company, January 1, 1946, and Mr. Costello's interest therein is reflected as being $17,636.40.

Q. Right. Now I show you Government's Exhibit 153, which the certified public accountant Murphy prepared for the Government at their request. And will you tell me what the balance is as of December 31, 1945? A. Is this (indicating) what you wish me to read?

Q. Yes. Read that and tell us what it is.

The Court: What is "this"? 153?

The Witness: 153, sir.

The Court: All right.

A. Balance at credit 12-31-45 after giving effect to profit, cash basis, December '45 as shown by monthly statement.

before provision for depreciation and after drawings for December, '45, $22,832.87.

Now, the basic difference between our two figures here is an accrual of profits which are not reflected on the books but which was made by Mr. Murphy.

(2054) Q. Now, Mr. Sohn, when I started out in this examination with you the first thing that we developed is that we agreed, at least you told me that is what it was, that when the profits are left in a partnership that you would then call them capital; didn't you tell me that? A. That is correct.

Q. Yes. Now read the figure again. The sum of $22,000 on that exhibit is 5,000 more than you have in your schedule, isn't it? A. Well, sir, this exhibit gives effect—

Q. Would you tell us yes or no? Is it or isn't it?

The Court: Is it or isn't it what?

Q. 5,000 more on Mr. Murphy's, certified public accountant; the Exhibit 153 that he prepared for the Government? A. The final figure as shown by Mr. Murphy, after giving effect to certain adjustments, is $22,832.87, which is—

Q. Which is roughly 5,000 more than yours; 5,000, isn't it? A. Yes, sir. We had given no effect to adjustments or accruals.

Q. I thought you told us that you had given effect to everything before. A. I would like to explain that adjustment, sir.

Q. Go ahead. If you have any explanation you (2055) want to make, go ahead and make it. A. The books of the Louisiana Mint Company are closed as of 11-30, November 30th of each year, and as of that date the books reflect the capital, the drawings, the profits, and a new net capital of each partner, and that date is November 30th of each year.

Now, in this schedule Mr. Murphy added to the capital account as it appears on November 30, 1945, the profits for the month of December, which he arrived at from his work sheets but which profits had not yet been distributed to the partners. And he arrives, therefore, at the greater figure of approximately 5,000.

Now, the adjustment for these profits made but not distributed in December of '45 on Mr. Murphy's schedule, which is Government's Exhibit 153, is $5,000, roughly, which is the difference between our two figures here.

Now, I—we took, rather, the figure appearing on the books less the actual cash distributed and made available to Mr. Costello in December. No adjustment was made for the profit that had been accrued.

In the first instance, that profit was not available to spend, there was no distribution of (2056) that profit, all distributions were properly taken into account, so that all moneys made available to Mr. Costello are properly considered.

In the second instance, from the books point of view, profits, under the Internal Revenue code, under the law, profits are not taxable to a partner until the close of the partnership year which falls within his calendar year.

In other words, profits earned for the year ending November 30, 1946, would be reportable in the 1946 tax return of the taxpayer.

Now, as of December 31, 1945, the profits accrued on this statement were not taxable in that year to Mr. Costello nor were they distributed. And so in preparing our own net worth statement we omitted the 5,000.

Q. Now, you told us that—first of all, net worth has got nothing to do with money, taxable money, has it? A. In arriving at taxable money—

Q. Aren't you making a hodgepodge of both of them in your explanation? A. Of both of what?

Q. Your explanation about net worth and Mr. Costello, whether he got the cash or didn't get it. What you put in your net worth statement you testified was the value of his interest in Louisiana Mint at the (2057) end of the year; right? A. That is right, sir, yes.

Q. Of December 31, 1945? A. Yes, sir.

Q. And you told me twice this morning that if there were earnings in a partnership not drawn down, that they should be part of the capital account; right? You told me twice. Do you want to change your mind? A. No, sir. Undistributed earnings left in a business would constitute part of the capital account.

Q. That is the $5,000 earnings that Mr. Murphy picks up over and above your 17, that is exactly what it is, isn't it? Isn't that what it says it is on it? A. Well, that is what it says it is. It is undistributed earnings.

Q. That is right. So, therefore, it would be added on to the net worth to arrive at the figure of 22,000? A. If we did that, sir, we would have to make the adjustment—

Q. Isn't that right, that it should be, under your own testimony, that if there are undistributed earnings it should be added on to the capital account so you would have the partner's interest in it? A. No, sir, because undistributed earnings left to accumulate at the time that the books are closed would constitute additional capital, but to sit (2058) down day by day and make a computation of daily earnings and—

Q. Mister, Mister, doesn't it say on Exhibit—would you read it to the jury? What does it say on Exhibit—

The Court: What exhibit is being read?

Mr. Fennelly: 153.

The Witness: 153, your Honor.

The Court: Very well.

A. Balance—

Q. As to the balance, go on. A. Balance at credit 12-31-45, after giving effect to profits, cash basis, December '45, as shown by monthly statement, before provision for depreciation and after drawings for December 1945.

Q. How much? A. $22,832.87.

Q. And that is some 5,000 above your figure; right? A. Yes, sir, it is.

Redirect Examination by Mr. Pierpoint:

Q. Now, Mr. Sohn, the figure that we were arguing about before, the question we were arguing about before was whether or not there were any drawings in December, 1945, is that correct? A. That is correct, sir.

(2059) Q. Exhibit 153 was prepared by Mr. Charles B. Murphy, is that correct? A. That is correct, sir.

Q. And does that show any drawings in December 1945? A. It does, sir.

Q. In what amount? A. $5,625.

Mr. Pierpoint: No further questions.

Recross Examination by Mr. Fennelly:

Q. I take you back again to Mr. Murphy's exhibit. And he is a certified public accountant, isn't he? A. Yes, sir, he is.

Q. And he is the man who kept these books? A. He so testified.

Q. Of Louisiana Mint; right? A. Yes, sir.

Q. You had nothing to do with them; you are not a certified public accountant, are you? A. No, sir.

Q. And Mr. Murphy's statement shows that there was no—which is Exhibit—

The Court: 150, is it?

Q. —shows there was no drawing for the month of December, 1945, isn't that right? A. That is right, sir.

Redirect Examination by Mr. Pierpoint:

Q. And Mr. Murphy's statement, which is Exhibit 153, shows that there were drawings in nineteen— (2060) A. That is correct, sir.

Q. And the books show it, of Louisiana Mint, show that there were drawings for December 1945? A. They do, sir.

By Mr. Fennelly:

Q. The ledger doesn't show that, does it? Frank Costello Partner Account November 30, 1946, is debited in the sum of $25,875, isn't that right? A. That is correct, sir.

Q. And that entry is consistent with that amount being a drawing, is it not? A. I should like to refer to the drawing account, which is Government's Exhibit 151.

The drawing account shows total drawings of $25,875; which agrees with our partnership account.

However, under date of January 31st we have an entry—

The Court: January 31, what year?

The Witness: January 31, 1946.

A. (Continuing) —we have a debit to our distribution or drawing account which is characterized as follows: Distributed in December and January $10,125.

Q. Now, Mr. Murphy kept this, and he also made a statement, Exhibit 153, which shows that there was no cash distributed, is that right?

(2061) Mr. Pierpoint: Exhibit 153 shows distribution in nineteen—

Mr. Fennelly: Excuse me. I mean Defendant's Exhibit.

Q. Now, Defendant's Exhibit X, which shows that no distribution was made; isn't that right? A. That is correct.

Q. And you couldn't arrive at—his cash balance would be incorrect if a distribution had been made, wouldn't it? A. Yes, that is so. However, Mr. Murphy testified that he did not verify the cash balance.

Q. But Mr. Murphy testified that he had no knowledge actually as to whether no—whether this distribution of some $5,000-odd was made in December 1945 or January, and he was the accountant for it.

Now, you have no knowledge yourself, have you? A. I have knowledge of what appears in the books, sir.

Q. Mr. Murphy, who kept the books, said that he didn't remember and had no knowledge as to when it was made. Now, are you telling us that you have more knowledge than the man who kept the books? A. I should like to see that statement of Mr. Murphy.

Q. Weren't you here when he testified? (2062) A. Well, I do not have specific recollection of—

Q. Were you here when he testified? A. Yes, I was, sir.

Mr. Pierpoint: No further questions, your Honor.

The Court: Do you or don't you recall whether or not he said he didn't know?

The Witness: I don't specifically recall.

The Court: Is it a fact that he didn't say he didn't know? Isn't that the fact?

Mr. Pierpoint: I beg your pardon?

The Court: Isn't it a fact that Mr. Murphy on the stand here said he couldn't recall whether or not the money had been paid in '46 or '45?

Mr. Fennelly: That is right.

Colloquy

Mr. Pierpoint: Your Honor, he testified that he did not make, himself, all the distributions, and then he said—

The Court: Here we go again. I am trying to find out one thing. What did he say with respect to that, and that is a matter that ought to be very easily ascertainable.

Mr. Pierpoint: Yes, he did make a specific statement that he didn't recall.

The Court: Then he also said that he did not (2063) verify the cash.

Mr. Pierpoint: Yes.

The Court: He said those two things. Now, we have two exhibits in evidence which appear to show one thing, and some other exhibits that appear to show another, and the man that had to do with all of them said he was not sure, and you have taken a view different from what Mr. Fennelly asked you to take.

Very well. All right. Now let us go ahead.

Mr. Pierpoint: No further questions, your Honor.

Mr. Fennelly: No further questions.

(Witness excused.)

Mr. Fennelly: I would like to just mark for identification, if I may at this time, those exhibits we were discussing the other day. I could do it afterwards. I don't need the jury for that.

Mr. MacMahon: I don't know what exhibits.

The Court: I don't either, but Mr. Fennelly will tell us about it. He says he doesn't need to do it now.

Have you any other witness to call?

Mr. MacMahon: No, your Honor. The Government rests.

Colloquy

The Court: Very well. It is 20 minutes of 1 (2064) of a warm Friday afternoon. I assume that you will have some motions to make, Mr. Fennelly?

Mr. Fennelly: Yes, your Honor. I would like to, in addition to offering those exhibits, some exhibits that we discussed the other day and I don't think have been marked for identification, I may be wrong, we have some motions to make with relation to striking out some of the exhibits and testimony.

The Court: What are these exhibits you are talking about?

Mr. Fennelly: I will take them up. It is unnecessary to have the jury present. There are only two papers, possibly they may be marked, but we can take that up after, but I will need some time to prepare motions to strike exhibits and so on.

The Court: I don't suppose it would make anybody annoyed if we adjourned now until Monday morning at 10.30.

Is that agreeable to the Government?

Mr. MacMahon: That is all right, your Honor.

The Court: Very well. And you, Mr. Fennelly?

Mr. Fennelly: Yes, your Honor.

The Court: I take it the jury won't object.

All right, we will adjourn now until 10.30 on Monday morning.

(2065) Now, the Government's case is rested and it is particularly important for you to be mindful of what I have been telling you, not to be discussing the case among yourselves and not to try to make up your own minds. The case is not at all finished. So, keep your minds completely open. Don't talk about the case among yourselves or with anybody else. And don't be looking for any evidence in the newspapers. Keep your minds completely open until all

the evidence is in, until the case is submitted to you, if it ever is, with the instructions of the Court.

Enjoy the weekend.

Ten-thirty Monday morning.

(Jury retires.)

Mr. Fennelly: In connection with the assessments, your Honor, that we had started to examine the witness about the other day, I had not marked for identification, and I would only like to mark a portion of them that—

The Court: Who was the witness you discussed it with?

Mr. Fennelly: Mr. Murphy, I guess it was.

The Court: Mr. Leath?

Mr. Leath: I don't know which exhibit he is talking about.

Mr. Fennelly: On the assessments.

(2066) The Court: My recollection is it was Mr. Murphy.

Mr. Fennelly: Mr. Murphy, I believe.

Mr. MacMahon: No, your Honor, it was Mr. Leath.

The Court: I may be wrong.

Mr. Fennelly: Then it was Mr. Leath. I started to discuss them with Mr. Leath—with Mr. Leath, it was.

Mr. MacMahon: And then it wound up they were never marked, were never offered or were never identified.

The Court: I thought it was Mr. Murphy.

Mr. Fennelly: What had happened, we had had a discussion and your Honor said you would deny the offer but they were never actually marked. So

I now want to mark them so we will have in the record—

The Court: Let me see. Wait a minute. Wasn't that the situation that I indicated, if you wanted part in, I thought you would have to put in some parts which you thought weren't advisable?

Mr. Fennelly: No, no. This is the assessment. You remember we discussed it the other evening, one afternoon, and again in the morning as to the civil case being based on these assessments.

The Court: Yes.

Mr. Fennelly: Actually—

The Court: Wasn't that in connection with a situation where you wanted to get in one part of the paper (2067) which related to assessments, related to 1926 and 1927—wasn't it?

Mr. Fennelly: No. No. That is something else your Honor is thinking about, about an agent's report you are thinking of, and that happened away back.

The Court: Oh, yes.

Mr. Fennelly: About a week or so ago.

The Court: That is right. I am thinking of that.

Mr. Fennelly: This is in connection with assessments for 1941 through 1945 and you—

The Court: Why don't you show it to me in the record?

Mr. Fennelly: I just want to have them marked for identification now.

The Court: I have no recollection of it.

(Marked Defendant's Exhibit DD for identification.)

The Court: Now, why can't you do this, Mr. Fennelly?—I wish you would wait and do this on Mon-

day. You want now to mark in evidence something which you say—

Mr. Fennelly: Not in evidence. Just for identification.

The Court: You want to mark for identification something on which you say I had made a ruling—

Mr. Fennelly: That is right.

(2068) The Court: —or indicated what the ruling would be. That may very well, and I am sure you are not trying to mislead, but I will feel a lot more comfortable if I have a look at the record.

Show me what it is. Do you want to do it now?

Mr. Fennelly: No. Monday is all right.

The Court: Monday is all right.

Mr. Fennelly: I will have the record and give you the page.

The Court: All right, fine.

Now, I wish counsel and the reporter would come into chambers. I just want to discuss with you the question of time as to the submission of requests to charge and certain other matters. It only has to do with the housekeeping of the trial.

(The following discussion occurred in the robing room:)

The Court: I received from the Government Wednesday or Thursday their proposed requests for instructions to the jury, and, Mr. Fennelly, you told me then you were working on them.

Mr. Fennelly: That is right.

The Court: And you told me again yesterday you were working on them and that at that time you weren't able to forecast with any possible degree of (2069) practical certainty how long it would be.

before we get to the point where the Court would need these.

Mr. Fennelly: They are dictated but not read. All typed out, but it is a matter of reading them, and I hope to have them for you this afternoon.

The Court: Fine.

Can you tell me, next, how long you think the defense is likely to go?

Mr. Fennelly: That is a guess, and I am only guessing because we are about now to sit down and have a conference on the subject, but I would think about two days. I would think that, two days. I would hardly think more than that in any event.

The Court: That is fair enough.

Mr. Fennelly: I beg your pardon?

The Court: I say, that is a fair enough guess for it. We will have concluded by the end of the week.

Mr. Fennelly: And if we should decide not to put in a defense, then I would assume your Honor would expect us to go forward in any event on Monday.

The Court: That would depend, you see. That is where these requests come in. I want to go over the requests and indicate to you those that I am going to give and those that I am going to refuse, (2070) and I should like to do that before summations. I think that is to your benefit, I mean, to the benefit of counsel.

Mr. MacMahon: Yes, your Honor, but may I say here that the Government would seriously resist any delay beyond Monday on that. I think it would prejudice the trial if it is allowed to drag on. The evidence is in.

The Court: It may very well, but that is a problem. Don't get mad at Mr. Fennelly for it. You will have to get mad at me for it.

Mr. MacMahon: I am not getting mad at anyone, your Honor. I am simply stating—

The Court: It sounded as though you were.

Mr. MacMahon: —that the jury, while this evidence is somewhat fresh in their minds, should receive the case promptly, if it is to go to them; that we have had a five weeks' trial here and it seems to me that this should not come as any sudden decision that Mr. Fennelly has to make, whether there is to be a defense or not to be one, in the event we get to the jury, and, therefore I think at this time we should know whether we are going to have that or not and be prepared to go forward on Monday.

The Court: I don't think it makes very much (2071) difference one way or the other. We are going to go forward on Monday with motions and, unless there is something extraordinary about the motions, I hope to be able to dispose of them as they are made.

I expect Mr. Fennelly, if he is going to put in a defense, to be ready to go forward Monday, but Mr. Fennelly's client and himself and his associates may decide even on Monday, if they decide this afternoon to put in a defense, on Monday they may decide not to put in a defense.

All I am saying is that I want time, and it may take a day to do it, and I will do it after the conclusion of the case, so I can study the requests to charge; and then I will require counsel to sum up the next day and then it will go to the jury. The case will go to the jury with the charge, if we can get through the charge in one day. If we can dispose of summations and charge in one day, all right. The chances are we won't. I suppose you will all want some time to sum up.

Mr. Fennelly: Mr. Delaney just said to me before that he has quite some alterations to make and it may be that he cannot get the requests to you today.

Mr. Delaney: We might be able to get them to (2072) you, I would say, by 6 o'clock tonight. I am not sure. We proposed about 50 requests in the draft form. I have made some changes in them and maybe there won't be many if we get down to it, but putting it in final form is a typing job. I had a man here earlier this morning but he had to leave, so it might be 2 o'clock or half-past 2 before I get back to the office, to get them in final form, after Mr. Fennelly and I have gone over them.

Mr. MacMahon: May we have an arrangement at the time defendant's requests are delivered to your Honor, they exchange with us at that time?

The Court: Oh, yes, yes. Surely.

I will tell you what to do. I probably won't be in my chambers at 6 o'clock.

Mr. Delaney: We can send them to your home.

The Court: There will be somebody in the United States Attorney's office, and I expect to be here sometime tomorrow, and you may leave my copy with the United States Attorney.

Mr. Delaney: All right.

You are going to give him a copy of them anyhow, so leave my copy with him and he can send it up to me or I will have my clerk call for it, or I will pick it up myself.

(2073) Mr. Pierpoint: Just on the mechanics, depending on what time they are ready, we may have to make some arrangement with the Clerk to have someone here.

Mr. Delaney: We will call you.

Mr. Pierpoint: Call me on the telephone, would you?

Colloquy

Mr. Delaney: Before I send them down. But I say six, it might be seven. We will get them out as quickly as possible.

The Court: You are not going to have anybody here at 7. If you don't get them here by 6, have them here tomorrow morning, or do you expect to have a staff working tonight?

Mr. MacMahon: I expect to.

The Court: All right. Get them whenever you can tonight.

How long are you going to want to sum up?

Mr. Fennelly: I should think not more than two hours.

The Court: And you, Mr. MacMahon?

Mr. MacMahon: I should think not longer than that.

The Court: That means, then, that we will have summations one day and the charge the following morning. I am not going to give the case to the jury (2073a) at 4 o'clock in the afternoon.

Mr. Fennelly: I haven't worked on it. It may be it might be much less.

Mr. MacMahon: Mine might be, too.

Mr. Fennelly: Might be able to work it down to an hour.

Mr. MacMahon: I might be able to do the same thing, your Honor.

The Court: That is all right; we will see.

(Adjourned to May 10, 1954, at 10.30 a.m.)

Colloquy

(2074) New York, May 10, 1954;
10.30 o'clock a.m.

Trial resumed.

(Jury not present.)

The Clerk: If there are any witnesses present in the courtroom at this time they will please retire to the witness room.

Mr. Fennelly: Mark this for identification.

(Marked Defendant's Exhibit EEE for identification.)

Mr. Fennelly: And this.

(Marked Defendant's Exhibit FF for identification.)

The Court: What are these, the assessments?

Mr. Fennelly: These are those assessments, your Honor, that, I think, for the sake of the record should be marked for identification.

The Court: Yes, I think so.

(Marked Defendant's Exhibit GGG for identification.)

Mr. Fennelly: For the record, they are the (2075) assessments for additional income for the years 1941 through 1945 for Frank and Loretta Costello.

The Court: Yes.

They are now the subject of the defendant's petition before the Tax Court?

Motion to Dismiss Certain Evidence

Mr. Fennelly: That is right.

I move to strike from evidence the testimony and exhibits as to the purchase of a Philco air-conditioning machine on the ground that there has been no proof of the fact that the Costellos paid for it, either Mr. or Mrs.

The Court: Motion denied.

Mr. Fennelly: I also move similarly as to the purchase of the Cadillac car in 1949, which the evidence shows was purchased by a man named Joseph Henschel, on the ground that there is no proof that Mrs. Costello paid for it.

The Court: Motion denied.

Mr. Fennelly: In connection with the testimony of Miss Thal, of Wilma Gowns, I move to strike out an item of $450 as an expenditure in 1949 because the witness testified that there was no proof that it was paid in 1949, and Mrs. Costello's bank account indicated, through that same witness, that there was no such payment in '49 of that item. It had been purchased in December of (2076) 1949 and no proof that it had been paid for in that month.

The Court: How about that, Mr. MacMahon?

Mr. MacMahon: I would like an opportunity to look at the record on that.

The Court: Yes, surely.

Mr. Fennelly: I move to—

The Court: Wait a minute. All right. Let us go along, and we will take that up. I will reserve decision on the motion with respect to that item.

Mr. Fennelly: I move to strike all of the testimony and exhibits relating to expenditures by Mrs. Costello on the ground that there is no proof that the money which she spent was money from her husband.

Motion to Dismiss Certain Evidence

The Court: Denied. Pardon me just a minute. This is purely an act of kindness. Your voice is low, and the gentlemen of the press who are sitting back here seem not to be able to hear you, so I will say to them: If it will help you to come up and sit in the first row of the jury box and hear what is going on you may do that.

Mr. Fennelly: I also move to strike Government's Exhibits 362, 363, 364 and all of the letters attached to them, on the ground that they do not reflect an opening net worth statement upon which the balance (2077) of those schedules are predicated, they omit cash on hand, for example, of Mrs. Costello, and they also omit non-taxable receipts through the years 1937 to 1945 and also in the years '46 through 1949.

The Court: When you say they omit these things, you mean they do not contain any statement that there were such items.

Mr. Fennelly: That is right.

The Court: Very well.

Mr. Fennelly: And they do not contain the items.

On the same ground I move to strike Exhibits 365 through 368, which would be the computations of tax made by the Government based on their assumed figures, on the ground that those figures were not proven.

The Court: Both motions are denied. That is the motion with respect to all of the exhibits and 363 through 365 is denied. The testimony will remain in.

Mr. Fennelly: I move to strike all of the exhibits and testimony relating to net worth expenditure method, on the ground that the government's own witness has testified that the items reported in the income tax returns were traceable to sources, that

is, to books and records of Crescent, Louisiana Mint, 79 Wall Street, that, therefore, there is no foundation been laid at all in the case that it is necessary to use a net worth (2078) expenditure method which under the tax law cannot be used unless the foundation is laid for it.

The Court: Would you point out the provision of the law?

Mr. Fennelly: Yes. That is Title 26, United States Code, Section 41.

The Court: What section? 41?

Mr. Fennelly: 41, Title 26.

The Court: I don't have the section here.

All right. Do you want to go on with your next motion then?

Mr. Fennelly: I move to dismiss the indictment on the ground that it appears that there was no competent evidence before the grand jury upon which this indictment could be predicated, and that it was returned in violation of the defendant's constitutional rights under the Fifth Amendment.

The Court: Motion denied.

Mr. Fennelly: And I move for a judgment of acquittal on the ground that there was no proof of the starting and net worth with reasonable certainty as it is admitted on the face of the Government's exhibits, and the testimony that they had no knowledge of cash on hand of Mrs. Costello and that other items such as the whether the receipt of $66,000 from the Kastel partnership (2079) by Mr. Costello occurred before or after October 18, 1937 which was the starting point; also, that there is no proof of the value of the physical assets of the Bayou Novelty Company as of that date in which Mr. Costello had an interest through half interest of Mr. Kastel's

interest in Bayou Novelty; not only is there no proof of the value of the assets but no proof as to what the assets were; nor is there any proof at the beginning of the indictment year, which is 1946, as to what the cash on hand was or what the net worth was of Mr. and Mrs. Costello as of that date.

The Court: I will hear you on that, Mr. MacMahon.

Mr. MacMahon: As to the starting point in 1937 with respect to Mrs. Costello, that starting point as to her may be established by circumstantial evidence. It is not necessary that it be established by direct evidence. The circumstantial evidence that all Mrs. Costello had at that time was approximately $1,100 in the Hudson River branch of the Corn Exchange Bank we believe sufficient to take that question to the jury, your Honor.

There is proof here that as of that date there were large outstanding tax liabilities running back to as far as 1926 on which interest was running at 6 per (2080) cent.

There is proof here that the defendant referred to Mrs. Costello in 1937 as his dependent.

There is proof here that in 1939 he said that he gave her whatever money went into her bank account.

In 1943, through Mr. Greenbaum of Greenbaum, Wolff & Ernst, he stated that he gave her all the money that was used to pay the rent, to buy the clothes and for ordinary household expenses; that he had purchased the Cadillac in the year 1941. There is proof that Cadillac was purchased on time, on the installment plan.

There is proof that Mrs. Costello never filed any individual income tax return prior to 1937; that

whatever tax returns were filed prior to that time were joint.

There is proof that judgments were outstanding during this period of time which were not paid off until 1943; and that those long outstanding tax liabilities were not paid off, some of them, until as late as 1937.

The Court: That was against the defendant?

Mr. MacMahon: They were against the defendant, and some she was severally liable on, your Honor, since some of them were joint returns.

The Court: What do you say about the point Mr. Fennelly raises about the absence of any proof as (2081) to the value of the assets of the Bayou and the other companies in which Kastel—

Mr. MacMahon: As to the absence—

The Court: —had an interest?

Mr. MacMahon: —of proof, your Honor, I disagree.

There is proof in the record, through Agent Matheny, who examined the Bayou's books and who testified that all of the original capital invested in Bayou Novelty Company had been returned in April of 1937, some six months before Costello testified before Ronayne on October 18, 1937 and at that time, your Honor will recall, Costello testified that he received his money from Kastel weekly or monthly.

Matheny also testified that the money that Kastel received, some $12,000 in 1937, had been paid to Kastel again in April of 1937; and Costello testified in October—rather, Matheny stated that the money that Kastel received was in Kastel's hands by June of 1937; and Costello testified that he received his last payment from Kastel some three months before

that, and that was $5,000. Kastel had received twelve, Costello five.

So I think the inference is clear there, your Honor, that Costello got his share of the money from (2082) Bayou Novelty Company through Phil Kastel before he ever testified on October 18, 1937.

And further, your Honor, Matheny testified that at the time he saw the Bayou books there were deficits in the capital accounts. So there could have been no funds which came from that source to Costello, available for expenditures, after 1946.

As to the proof of cash on hand at the beginning of 1946, your Honor, I think, again, the circumstantial evidence is clear. there was no such cash on hand.

The Government's proof shows that the Costellos had spent over and above their reported income from 1937, through to the end of 1945 some $202,000 and that, your Honor, I submit, is more than enough to absorb whatever cash on hand was found or discovered by the Government after a thorough investigation.

Furthermore, there is proof that in 1946 Costello claims to have made a loan from Erickson in the amount of $25,000, and it is quite inconsistent with there being a large amount of cash on hand that he would go out and borrow $25,000.

So we submit that on these points there is sufficient evidence to go to the jury on all of them.

Mr. Fennelly: Your Honor, as to Mrs. Costello's (2083) opening cash, there is no proof in this record as to what amount was in the bank account even that she had on October 18, 1937 at the—

The Court: Yes, but there is an inference from which the jury might conclude that she had had

$1,156 and transferred it over to the Hudson River branch.

Mr. Fennelly: There is no proof of that. All that the card says is that there was a check drawn on that bank account.

The Court: There is evidence from which the jury could make the finding, in my opinion.

Mr. Fennelly: Your Honor, and then I believe there is certainly no evidence which would show how much money Mrs. Costello had drawn out of that bank account, cash, and had held it prior to that date. She might have had a hundred thousand dollars in her account and had drawn it out, and there is no proof, as the witnesses have admitted.

Apart from the bank account, there is certainly not one shred of proof as to how much cash she had on hand. They give absolutely no credit for having a $5 bill in her pocketbook. Absolutely none, whatever, your Honor. Absolutely no proof whatsoever.

And the fact that in an insurance application (2084) or in testimony, when you say someone is dependent, why, your wife is always dependent to that extent. If you write in an insurance policy your dependencies if you have a wife, even if your wife should be worth millions, she is still a dependent.

The fact that, even that Mrs. Costello might have owed back taxes to the Government, that is not proof that you haven't cash on hand. Might not have paid them but it is no proof that you haven't cash on hand.

For example, if you base inferences on that, Hetty Green—

The Court: Let us leave Hetty Green wherever she is and stick to this.

Mr. Fennelly: What I wanted to point out to you,